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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KRISTYNE HANBERG, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

DRUGSTORE.COM, INC., a Delaware
corporation; and DOES 1 – 10, inclusive,

Defendants.

Case No. 8:16-cv-523

CLASS ACTION COMPLAINT FOR:

1. VIOLATIONS OF CALIFORNIA'S
AUTOMATIC RENEWAL LAW
(BUSINESS AND PROFESSIONS
CODE §§ 17600-17604); and
2. VIOLATIONS OF CALIFORNIA'S
UNFAIR COMPETITION LAW
(BUSINESS AND PROFESSIONS
CODE §§ 17200-17204).

DEMAND FOR JURY TRIAL

1 Plaintiff Kristyne Hanberg (“Plaintiff”), on behalf of herself and all others
2 similarly situated, complains and alleges as follows:

3 INTRODUCTION & OVERVIEW OF CLAIMS

4 1. Plaintiff brings this class action on behalf of herself and a class of others
5 similarly situated consisting of all persons in California who, within the applicable
6 statute of limitations period, purchased subscriptions for any products (such as vitamin
7 supplements and other drugstore products) from Drugstore.com, Inc. (“Drugstore.com”
8 or “Defendant”). The class of others similarly situated to Plaintiff is referred to herein
9 as “Class Members.” The claims for damages, restitution, injunctive and/or other
10 equitable relief, and reasonable attorneys’ fees and costs arise under California
11 Business and Professions Code (hereinafter “Cal. Bus. & Prof. Code”) §§ 17602,
12 17603, and 17604) and 17200, *et seq.*, and California Code of Civil Procedure § 1021.5.
13 Plaintiff and Class Members are consumers for purposes of Cal. Bus. & Prof. Code §§
14 17600-17606.

15 2. During the Class Period, Defendant made automatic renewal or continuous
16 service offers to consumers in and throughout California and (a) at the time of making
17 the automatic renewal or continuous service offers, failed to present the automatic
18 renewal offer terms or continuous service offer terms, in a clear and conspicuous
19 manner and in visual proximity to the request for consent to the offer before the
20 subscription or purchasing agreement was fulfilled in violation of Cal. Bus. & Prof.
21 Code § 17602(a)(1); and (b) charged Plaintiff’s and Class Members’ credit or debit
22 cards, or third-party account (hereinafter “Payment Method”) without first obtaining
23 Plaintiff’s and Class Members’ affirmative consent to the agreement containing the
24 automatic renewal offer terms or continuous service offer terms in violation of Cal.
25 Bus. & Prof. Code § 17602(a)(2). As a result, all goods, wares, merchandise, or
26 products sent to Plaintiff and Class Members under the automatic renewal of
27 continuous service agreements are deemed to be an unconditional gift pursuant to Cal.
28 Bus. & Prof. Code § 17603.

Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend this Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

10. At all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and/or scope of said agency and/or employment with the full knowledge and consent of each of the Defendants. Each of the acts and/or omissions complained of herein were alleged and made known to, and ratified by, each of the other Defendants (Drugstore.com, Inc. and DOE Defendants will hereafter collectively be referred to as “Defendant”).

FACTUAL BACKGROUND

California Business Professions Code §§ 17600-17606

11. On December 1, 2010, sections 17600-17606 of the Cal. Bus. & Prof. Code came into effect. The Legislature’s stated intent for this Article was to end the practice of ongoing charges to consumers’ Payment Methods without consumers’ explicit consent for ongoing shipments of a product or ongoing deliveries of service. *See* Cal. Bus. & Prof. Code § 17600.

12. Cal. Bus. & Prof. Code § 17602(a) makes it unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following:

- i) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer.
- ii) Charge the consumer's credit or debit card or the consumer's account with a third party for an automatic renewal or continuous service without first obtaining the consumer's

1 affirmative consent to the agreement containing the automatic
2 renewal offer terms or continuous service offer terms.

3 13. Cal. Bus. & Prof. Code § 17601(a) defines the term “Automatic renewal”
4 as a “plan or arrangement in which a paid subscription or purchasing agreement is
5 automatically renewed at the end of a definite term for a subsequent term.”

6 14. Cal. Bus. & Prof. Code § 17601(b) defines the term “Automatic renewal
7 offer terms” as “the following clear and conspicuous disclosures: (1) That the
8 subscription or purchasing agreement will continue until the consumer cancels. (2) The
9 description of the cancelation policy that applies to the offer. (3) The recurring charges
10 that will be charged to the consumer’s credit or debit card or payment account with a
11 third party as part of the automatic renewal plan or arrangement, and that the amount of
12 the charge may change, if that is the case, and the amount to which the charge will
13 change, if known. (4) The length of the automatic renewal term or that the service is
14 continuous, unless the length of the term is chosen by the consumer. (5) The minimum
15 purchase obligation, if any.”

16 15. Pursuant to Cal. Bus. & Prof. Code § 17601(c), “clear and conspicuous” or
17 “clearly and conspicuously” means “in larger type than the surrounding text, or in
18 contrasting type, font, or color to the surrounding text of the same size, or set off from
19 the surrounding text of the same size by symbol ls or other marks, in a manner that
20 clearly calls attention to the language.”

21 16. Section 17603 of Cal. Bus. & Prof. Code provides: “In any case in which a
22 business sends any goods, wares, merchandise, or products to a consumer, under a
23 continuous service agreement or automatic renewal of a purchase, without first
24 obtaining the consumer’s affirmative consent as described in Section 17602, the goods,
25 wares, merchandise, or products shall for all purposes be deemed an unconditional gift
26 to the consumer, who may use or dispose of the same in any manner he or she sees fit
27 without any obligation whatsoever on the consumer’s part to the business, including.
28

1 but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares,
2 merchandise, or products to the business.”

3 **Defendant’s Business**

4 17. Defendant provides an “Auto-Reorder & Save” subscription program
5 whereby a prospective subscriber may select specific products for automatic delivery
6 every 30, 60, or 90 days or more. Defendant’s product and services plan constitutes an
7 automatic renewal and/or continuous service plan or arrangement for the purposes of
8 Cal. Bus. & Prof. Code § 17601.

9 **Defendant’s Terms & Conditions**

10 18. During the Class Period, Defendant’s webpage, found at
11 www.drugstore.com contain a section entitled “terms of use” (hereinafter “Terms of
12 Use”). **This is a lengthy document that does not set forth any information**
13 **concerning the recurring nature of Defendant’s subscription programs or the**
14 **manner in which the subscriptions may be canceled.**

15 **Defendant’s Terms of Use Fail to Provide Clear and Conspicuous Disclosures As** 16 **Required by Law.**

17 19. Within the Terms of Use, Defendant failed to state in clear and
18 conspicuous language (*i.e.*, in larger type than the surrounding text, or in contrasting
19 type, font, or color to the surrounding text of the same size, or set off from the
20 surrounding text of the same size by symbols of other marks, in a manner that clearly
21 calls attention to the language) that:

- 22 i) The subscription or purchasing agreement will continue until the
23 consumer cancels;
- 24 ii) Describes the cancellation policy that applies to the offer;
- 25 iii) Recurring charges that will be charged to the consumer’s Payment
26 Method account with a third party as part of the automatic renewal
27 plan or arrangement, and that the amount of the charge may change,
28

1 if that is the case, and the amount to which the charge will change, if
2 known; and

3 iv) The length of the automatic renewal term or that the service is
4 continuous unless the length of tile term is chosen by the consumer.

5 **Defendant Failed to Present the Automatic Renewal Offer Terms or Continuous**
6 **Service Offer Terms in a Clear and Conspicuous Manner Before the Subscription**
7 **or Purchasing Agreement was Fulfilled and in Visual Proximity to the Request for**
8 **Consent to the Offer in Violation of Cal. Bus. & Prof. Code § 17602(a)(1).**

9 20. During the Class Period, Defendant made, and continues to make, an
10 automatic renewal offer for its subscriptions plans to Consumers in California,
11 including Plaintiff and Class Members. On the pages on the website where a
12 prospective subscriber is invited to complete a purchase, the pages did not, and do not,
13 contain automatic renewal offer terms or continuous service offer terms as defined by
14 Cal. Bus. & Prof. Code § 17601(b).

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2 sites

1 bag

1 item \$6.79

checkout

take an extra **20% off EVERYTHING** in our **vitamins** department*

offer ends Saturday 11/7 | *exclusions apply [click to redeem](#)

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personal care

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baby & mom

vitamins

diet & fitness

sexual well-being

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CLASS ACTION COMPLAINT



billing & shipping place order order complete

checkout | enter your billing & shipping information

Billing Information

Name:

Address line 1:

Address line 2: (optional)

City:

State/Region: - Select a state/region -

ZIP code:

Phone:

Example: 555-555-5555
(We need this to contact you if there's a problem with your order.)

Shipping Information

☐ Use my billing address

Name:

Address line 1:

Address line 2: (optional)

City:

State/Region: - Select a state/region -

ZIP code:

Phone: (optional)

Secondary Phone: (optional)



U.S., U.S. Territory and APO/FPO/DPO addresses only

Payment Information

☐ Card


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[checkout](#) | [place order](#)

Please review your order and payment information below. Your order total is: **\$13.32**

Payment Information

Select a payment method you would like to use for this order

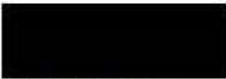








Select a new payment method

Shipping Destination and Method

Please select a shipping address and shipping method below. The charges listed may include surcharges or fees associated with the shipment of overweight orders or delivery to extended service areas. If you have questions, read about our shipping rates and information.

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Add a new address


Ship using:

☐ Standard Shipping \$5.99
 ☐ 2-Day Shipping \$12.99
 ☐ Overnight Shipping \$19.99
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Items In Your Order

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| PRODUCT | QUANTITY | SAVINGS | TOTAL |
|---|----------|---------|--------|
|  <p>Neutrogena Make-up Remover Cleansing Towelettes Refill Pack - 25 ea In stock  SHOPRUNNER eligible</p> | 1 | \$1.20 | \$6.79 |



We make gift-giving easy.
Ship this order as a gift.


item total: \$6.79
standard shipping: \$5.99
estimated tax: \$0.54
order total: **\$13.32**
total savings: **\$1.20**

PROMO CODES AND GIFT CARDS [?](#)

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The following promos have been applied to your order:

- Save 10% on Neutrogena beauty products.

 You'll earn **\$0.34** in drugstore.com dollars™ when this order ships.
 (This total may change, as it doesn't reflect any credits used to purchase your order.)
 You can redeem the drugstore.com dollars™ you earn today between January 1 - January 31, 2016.

Your order is not complete until you press this button:

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21. As a result, prior to charging Plaintiff and Class Members, Defendant failed, and continues to fail, to obtain Plaintiff's and Class Members' affirmative

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CLASS ACTION COMPLAINT

1 consent to language containing the automatic renewal offer terms or continuous service
2 offer terms.

3 22. Because of Defendant's failure to gather affirmative consent to the
4 automatic renewal terms, all goods, wares, merchandise, or products, sent to Plaintiff
5 and Class Members under the automatic renewal or continuous service agreement are
6 deemed to be an unconditional gift pursuant to Cal. Bus. & Prof. Code § 17603, and
7 Plaintiff and Class Members may use or dispose of the same in any manner they see fit
8 without any obligation whatsoever on their part to Defendant, including, but not limited
9 to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise or
10 products.

11 CLASS ACTION ALLEGATIONS

12 23. Plaintiff brings this action, on behalf of herself and all others similarly
13 situated, as a class action pursuant to Rule 23(a) of the Federal Rules of Civil
14 Procedure. The proposed Class (the "Class") that Plaintiff seeks to represent is
15 composed of and defined as:

16 **"All persons within California that, within the applicable statute of**
17 **limitations period, purchased any product or service in response to an**
18 **offer constituting an "Automatic Renewal" as defined by § 17601(a)**
19 **from Drugstore.com, Inc., its predecessors, or its affiliates."**

20 24. This action is brought and may be properly maintained as a class action
21 pursuant to the provisions of Federal Rule of Civil Procedure 23(a)(1)-(4) and 23(b)(1)-
22 (3). This action satisfies the numerosity, typicality, adequacy, predominance and
23 superiority requirements of those provisions.

24 25. [Fed. R. Civ. P. 23(a)(1)] The Class is so numerous that the individual
25 joinder of all of its members is impractical. While the exact number and identities of
26 Class members are unknown to Plaintiff at this time and can only be ascertained
27 through appropriate discovery, Plaintiff is informed and believes the Class includes
28

1 hundreds of thousands of members. Plaintiff alleges that the Class may be ascertained
2 by the records maintained by Defendant.

3 26. [Fed. R. Civ. P. 23(a)(2)] Common questions of fact and law exist as to all
4 members of the Class which predominate over any questions affecting only individual
5 members of the Class. These common legal and factual questions, which do not vary
6 from class member to class member, and which may be determined without reference to
7 the individual circumstances of any class member, include, but are not limited to, the
8 following:

- 9 i) (a) Whether Defendant failed to present the automatic renewal offer
10 terms, or continuous service offer terms, in a clear and conspicuous
11 manner before the subscription or purchasing agreement was
12 fulfilled and in visual proximity to the request for consent to the
13 offer in violation of Cal. Bus. & Prof. Code § 17602(a)(1);
- 14 ii) Whether Defendant charged Plaintiff's and Class Members'
15 Payment Method for an automatic renewal or continuous service
16 without first obtaining the Plaintiff's and Class Members'
17 affirmative consent to the Terms and Conditions containing the
18 automatic renewal offer terms or continuous service offer terms in
19 violation of Cal. Bus. & Prof. Code § 17602(a)(2);
- 20 iii) Whether Defendant's Terms of Use contained the automatic renewal
21 offer terms and/or continuous service offer terms as defined by Cal.
22 Bus. & Prof. Code § 17601;
- 23 iv) Whether Plaintiff and the Class Members are entitled to restitution
24 of money paid in circumstances where the goods and services
25 provided by Defendant are deemed an unconditional gift in
26 accordance with Cal. Bus. & Prof. Code § 17603;
- 27 v) Whether Plaintiff and Class Members are entitled to restitution in
28 accordance with Cal. Bus. & Prof. Code §§ 17200, 17203;

- 1 vi) Whether Plaintiff and Class Members are entitled to attorneys' fees
2 and costs under California Code of Civil Procedure § 1021.5; and
3 vii) The proper formula(s) for calculating the restitution owed to Class
4 Members.

5 27. [Fed. R. Civ. P. 23(a)(3)] Plaintiff's claims are typical of the claims of the
6 members of the Class. Plaintiff and all members of the Class have sustained injury and
7 are facing irreparable harm arising out of Defendant's common course of conduct as
8 complained of herein. The losses of each member of the Class were caused directly by
9 Defendant's wrongful conduct as alleged herein.

10 28. [Fed. R. Civ. P. 23(a)(4)] Plaintiff will fairly and adequately protect the
11 interests of the members of the Class. Plaintiff has retained attorneys experienced in the
12 prosecution of class actions, including complex consumer and mass tort litigation.

13 29. [Fed. R. Civ. P. 23(b)(3)] A class action is superior to other available
14 methods of fair and efficient adjudication of this controversy, since individual litigation
15 of the claims of all Class members is impracticable. Even if every Class member could
16 afford individual litigation, the court system could not. It would be unduly burdensome
17 to the courts in which individual litigation of numerous issues would proceed.
18 Individualized litigation would also present the potential for varying, inconsistent, or
19 contradictory judgments and would magnify the delay and expense to all parties and to
20 the court system resulting from multiple trials of the same complex factual issues. By
21 contrast, the conduct of this action as a class action, with respect to some or all of the
22 issues presented herein, presents fewer management difficulties, conserves the
23 resources of the parties and of the court system, and protects the rights of each Class
24 member.

25 30. [Fed. R. Civ. P. 23(b)(1)(A)] The prosecution of separate actions by
26 thousands of individual Class members would create the risk of inconsistent or varying
27 adjudications with respect to, among other things, the need for and the nature of proper
28 notice, which Defendant must provide to all Class members.

31. [Fed. R. Civ. P. 23(b)(1)(B)] The prosecution of separate actions by individual class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of the other Class members not parties to such adjudications or that would substantially impair or impede the ability of such non-party Class members to protect their interests.

32. [Fed. R. Civ. P. 23(b)(2)] Defendant has acted or refused to act in respects generally applicable to the Class, thereby making appropriate final injunctive relief with regard to the members of the Class as a whole.

FIRST CAUSE OF ACTION

FAILURE TO PRESENT AUTOMATIC RENEWAL OFFER TERMS OR CONTINUOUS SERVICE OFFER TERMS CLEARLY AND CONSPICUOUSLY AND IN VISUAL, PROXIMITY TO THE REQUEST FOR CONSENT OFFER (CAL. BUS. & PROF. CODE§ 17602(a)(1))

(By Plaintiff, on her own behalf and on behalf of the Class, against All Defendants)

33. The foregoing paragraphs are alleged herein and are incorporated herein by reference.

34. Cal. Bus. Prof. Code§ 17602(a)(1) provides:

(a) It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following:

(1) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer.

35. Defendant failed to present the automatic renewal offer terms, or continuous service offer terms, in a clear and conspicuous manner and in visual proximity the request for consent to the offer before the subscription or purchasing agreement was fulfilled.

42. Plaintiff, on behalf of herself and Class Members, requests relief as described below.

THIRD CAUSE OF ACTION

VIOLATION OF THE UNFAIR COMPETITION LAW

(CAL. BUS. & PROF. CODE§ 17200 *et. seq.*)

(By Plaintiff, on her own behalf and on behalf of the Class, against All Defendants)

43. The foregoing paragraphs are alleged herein and are incorporated herein by reference.

44. Cal. Bus. & Prof. Code § 17200, *et seq.* (the “UCL”) prohibits unfair competition in the form of any unlawful or unfair business act or practice. Cal. Bus. & Prof. Code § 17204 allows “a person who has suffered injury in fact and has lost money or property” to prosecute a civil action for violation of the UCL. Such a person may bring such an action on behalf of himself or herself and others similarly situated who are affected by the unlawful and/or unfair business practice or act.

45. Since December 1, 2010, and continuing to the present, Defendant has committed unlawful and/or unfair business acts or practices as defined by the UCL, by violating Cal. Bus. & Prof. Code § 17602(a)(3). The public policy which is a predicate to a UCL action under the unfair prong of the UCL is tethered to a specific statutory provision. *See* Cal. Bus. & Prof. Code §§ 17600, 17602.

46. As a direct and proximate result of Defendant’s unlawful, and/or unfair acts and practices described herein, Defendant has received, and continues to hold, unlawfully obtained property and money belonging to Plaintiff and Class Members in the form of payments made for subscription agreements by Plaintiff and Class Members. Defendant has profited from its unlawful and/or unfair acts and practices in the amount of those business expenses and interest accrued thereon.

47. Plaintiff and similarly-situated Class Members are entitled to restitution pursuant to Cal. Bus. & Prof. Code § 17203 for all monies paid by Class Members under the subscription agreements from December 1, 2010, to the date of such

1 restitution at rates specified by law. Defendant should be required to disgorge all the
2 profits and gains it has reaped and restore such profits and gains to Plaintiff and Class
3 Members, from whom they were unlawfully taken.

4 48. Plaintiff and similarly situated Class Members are entitled to enforce all
5 applicable penalty provisions pursuant to Cal. Bus. & Prof. Code § 17202, and to obtain
6 injunctive relief pursuant to Cal. Bus. & Prof. Code § 17203.

7 49. Plaintiff has assumed the responsibility of enforcement of the laws and
8 public policies specified herein by suing on behalf of herself and other similarly-
9 situated Class Members. Plaintiff's success in this action will enforce important rights
10 affecting the public interest. Plaintiff will incur a financial burden in pursuing this
11 action in the public interest. An award of reasonable attorneys' fees to Plaintiff is thus
12 appropriate pursuant to California Code of Civil Procedure § 1021.5.

13 50. Plaintiff, on behalf of herself and Class Members, request relief as
14 described below.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff requests the following relief:

17 A. That the Court determine that this action may be maintained as a class
18 action under Rule 23(a) of the Federal Rules of Civil Procedure, and define the Class as
19 requested herein;

20 B. That the Court find and declare that Defendant has violated Cal. Bus. &
21 Prof. Code § 17602(a)(1) by failing to present the automatic renewal offer terms, or
22 continuous service offer terms, in a clear and conspicuous manner and the visual
23 proximity to the request for consent to the offer before the subscription or purchasing
24 agreement was fulfilled;

25 C. That the Court find and declare that Defendant has violated Cal. Bus. &
26 Prof. Code § 17602(a)(2) by charging Plaintiff's and Class Members' Payment Method
27 without first obtaining their affirmative consent to language containing automatic
28 renewal offer terms or continuous service terms;

1 D. That the Court find and declare that Defendant has violated the UCL and
2 committed unfair and unlawful business practices by violating Cal. Bus. & Prof. Code §
3 17602.

4 E. That the Court award to Plaintiff and Class Members damages and full
5 restitution in the amount of the subscription payments made by them pursuant to Cal.
6 Bus. & Prof. Code§ 17603, in an amount to be proved at trial;

7 F. That Defendant be ordered to pay restitution to Plaintiff and the Class due
8 to Defendant's UCL violations, pursuant to Cal. Bus. & Prof. Code §§ 17200-17205 in
9 the amount of their subscription agreement payments;

10 G. That the Court find that Plaintiff and Class Members are entitled to
11 injunctive relief pursuant to Cal. Bus. & Prof. Code § 17203;

12 H. That Plaintiff and the Class be awarded reasonable attorneys' fees and
13 costs pursuant to California Code of Civil Procedure § 1021.5, and/or other applicable
14 law; and

15 I. That the Court award such other and further relief as this Court may deem
16 appropriate.

17
18 Dated: March 18, 2016

NEWPORT TRIAL GROUP, APC

19
20 By: /s/Scott J. Ferrell

21 Scott. J. Ferrell

22 Attorney for Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2016, I electronically filed the foregoing **CLASS ACTION COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Scott J. Ferrell
Scott. J. Ferrell